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March 17, 2022

Via ECF
Honorable Mae A. D'Agostino
United States District Court
Northern District of New York
James T. Foley U.S. Courthouse
445 Broadway, Room 509
Albany, NY 12207-2924

Re: *Jacobson v. Bassett*, 22-cv-33 (MAD)(ML)

Dear Judge D'Agostino:

On March 16, 2022, Defendant filed a letter notifying the Court of a decision from the Eastern District of New York in *Roberts v. Bassett*, 22-cv-710 (E.D.N.Y.). That decision was wrong and should not be followed here.

First, *Roberts* wrongly concluded that the Policy is merely "guidance" that is "nonbinding" on healthcare providers. Op. 10, 12, 15, 17, 19. As explained, Reply 6-7, the Policy speaks in mandatory terms. It orders providers and facilities to "adhere" to its prioritization criteria and states that antivirals are "authorized" only for those who "meet all the [identified] criteria." Policy 1-2. No provider would feel free to violate the Policy. Reply Br. 7. Tellingly, *Roberts* never addresses the plain language of the Policy itself. Moreover, courts have long rejected government actors' excuses that they merely "recommend[ed]" that "third parties" engage in racial discrimination. *See Baldwin v. Morgan*, 287 F.2d 750, 753-54 (5th Cir. 1961) (holding that an Alabama railroad could not "invite[]" racial segregation among passengers—even if that segregation was not "coercively compelled"—because "[w]hat is forbidden is the state action in which color (i.e., race) is the determinant"); *see* Reply 6-7. *Roberts* never addresses this line of cases either.

Second, *Roberts* improperly held that the plaintiff lacked standing. *See* Reply 2-6. Indeed, *Roberts* never even cites the key case on standing—*Baur v. Veneman*, 352 F.3d 625 (2d Cir. 2003). There, the Second Circuit "recognized that threatened harm in the form of an increased risk of future injury may serve as injury-in-fact for Article III standing purposes." *Id.* at 633. Because downed cattle "may transmit . . . a deadly disease with no known cure or treatment," the Court found that "even a moderate increase in the risk of disease may be sufficient to confer standing." *Id.* at 637. *Baur* is directly on point

here. Because COVID-19 is a "deadly disease," "even a moderate increase in the risk" caused by the Policy is sufficient to confer standing. *Id.* at 637. *Roberts*'s failure to grapple with *Baur* and similar cases, *see* Reply 4-5, fundamentally undermines its analysis.

Roberts is not persuasive and, of course, is not binding on this Court. The Court should not rely on it here.

Respectfully submitted,

/s/ Michael Connolly

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